

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000047-MR

BIF, INC. AND CHALLENGER PIPING, INC.

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 01-CI-00441

COUNTY OF CAMPBELL, KENTUCKY EX REL. TRANSIT
AUTHORITY OF NORTHERN KENTUCKY AND
TRANSIT AUTHORITY OF NORTHERN KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellants, BIF, Inc. and Challenger Piping, Inc., appeal from an order of the Campbell Circuit Court denying their motion for attorney's fees and costs in this eminent domain proceeding. Finding no error, we affirm.

This is the second appeal from an eminent domain proceeding wherein the trial court found that Appellees, the County of Campbell, Kentucky, ex rel. the Transit

¹ Senior Judge Paul Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Authority of Northern Kentucky and the Transit Authority of Northern Kentucky (collectively, TANK), did not have the right to condemn property located in downtown Newport, Kentucky for the construction of a downtown transit center. A panel of this Court, in its prior opinion, set forth the procedural history as follows:

On April 10, 2001, TANK filed a petition under KRS 416.540, et. seq., the Eminent Domain Act, and KRS 96A.080 to condemn certain properties in Newport, Kentucky (the properties). The record owner of the properties was BIF, a Kentucky corporation solely owned by William Fennell, Sr. BIF had various leases on the properties.

In its petition, TANK stated that the condemnation action was “for the public interest, necessity and convenience.” And the taking was “necessary for the public purpose of constructing a new transit center.” TANK sought an interlocutory judgment under KRS 416.610 finding that it had the right to condemn the property and authorizing it to take possession of the properties.

BIF filed its answer and challenged TANK'S right to condemn the properties. BIF alleged that TANK had not followed the statutory procedures for instituting condemnation proceedings. In addition, BIF asserted that the properties were being taken under the guise of a public purpose. But BIF believed that the properties were being taken to assist private developers. Finally, BIF alleged that TANK instituted the condemnation proceedings in bad faith because TANK was taking too much land for its stated purpose and did not have the funding to complete the project.

Because BIF filed its answer and placed TANK's right to condemn at issue, the trial court scheduled a hearing under KRS 416.610(4). In the meantime, the parties engaged in extensive discovery.

Before the trial court conducted the right to condemn hearing, BIF made a motion for summary judgment, and TANK filed a motion to amend the petition to revise the

property description and name specific lessees who had been identified during the discovery process. TANK named The Goodyear Tire & Rubber Company as an interested party by virtue of an unrecorded lease or rental agreement. The trial court granted TANK's motion to amend its petition. But because TANK filed its motion to amend the petition one week before the scheduled hearing date, the trial court was compelled to postpone the hearing. Ultimately, the trial court rescheduled the hearing for August 26, 2003.

About a month and half before the rescheduled hearing date, BIF made a motion to dismiss the amended condemnation petition or postpone the hearing. The basis of this motion was that TANK had not yet received approval for federal funding, and TANK had not completed its review under the federal National Environmental Policy Act. The trial court granted BIF's motion to continue the hearing and heard oral arguments on BIF's motion to dismiss.

One month after oral arguments, the trial court determined that TANK had no right to condemn the property it described in its amended petition. In so doing, the trial court relied on the case of *Northern Kentucky Port Authority, Inc. v. Cornett*, 625 S.W.2d 104, 105 (Ky. 1981) for the proposition that the right to condemn exists where “there is a reasonable assurance that the intended use will come to pass.” The trial court found that TANK could not give the court such assurances in light of the fact that TANK could not obtain federal funding for the project. And the court found that the “scope, funding and impact of the transit center project now envisioned by TANK is materially different from the project that was presented to the Campbell County Fiscal Court when the Fiscal Court voted to approve this lawsuit as required by the statutes.” In the end, the trial court held that the changes to the project were so substantial that it must dismiss the condemnation petition.

County of Campbell, Kentucky, ex rel. Transit Authority of Northern Kentucky; and Transit Authority of Northern Kentucky v. BIF, Inc., 2003-CA-002318-MR (March 25, 2005) (Slip op. p.1-2).

We concluded in the first appeal that the trial court erred in failing to conduct the evidentiary hearing contemplated by KRS 416.610(4). Thus, the case was remanded to the Campbell Circuit Court for a hearing and findings on TANK's right to condemn the property. *Id.*

Following an extensive hearing in September 2006, the trial court issued Findings of Fact and Conclusions of Law. The court concluded that following the loss of federal funding, TANK had not taken any steps to develop alternative plans for the transit center, nor had it developed a financial plan or appropriated funding for the project. Further, the court noted that the substantial changes to the project without approval from TANK's Board or the Campbell County Fiscal Court was evidence of “gross abuse,” and was sufficient grounds for denying TANK's condemnation petition. *See Commonwealth v. Cooksey*, 948 S.W.2d 122 (Ky.App. 1997). However, with respect to Appellants' claim for costs and attorney fees, the trial court ruled:

In *Northern Kentucky Port Authority, Inc. v. Cornett*, 700 S.W.2d 392 (Ky. 1985), the Kentucky Court of Appeals held that costs and attorney fees may be awarded in a voluntary dismissal on an attempted condemnation case upon a finding of bad faith or unreasonable delay by the condemnor. The Court did not award attorney fees because no court had considered whether the Port Authority gave the Cornetts the runaround to cause them enormous defense expenses and wear them out, forcing some settlement in favor of the Port Authority. This Court does not believe that there is sufficient evidence that TANK was proceeding with the case in an effort to wear out the Respondents. TANK believes it has the authority to condemn as long as it has a public purpose. There is no evidence that the property sought to be condemned was picked for any purpose other than a transit center which potentially would eliminate stops and make

ridership easier. Before proceeding with eminent domain TANK knew it would be met with a vigorous defense and knew the standing of the Respondents it was proceeding against. Respondents motion for attorney fees is Overruled.

Appellants thereafter appealed to this Court. TANK has not appealed the trial court's dismissal of its petition for condemnation.

The sole issue on appeal concerns the trial court's denial of Appellants' request for costs and attorneys fees. Appellants argue that the evidence overwhelmingly established that TANK initiated and continued the litigation for an improper purpose and that even after TANK failed to secure federal funding and it became clear it could not proceed with the transit center, TANK continued the litigation solely to avoid paying attorney's fees and costs. Appellants contend that, contrary to the trial court's conclusion, TANK acted in bad faith and should bear the financial burden incurred by Appellants in defending this action, which they state currently exceeds \$650,000.

Our standard of review on appeal is whether the trial court abused its discretion in refusing to award Appellants costs and attorney's fees. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

Kentucky has long followed the "American Rule," that in the absence of a statute or contract expressly providing therefor, attorney fees are not allowable as costs, nor recoverable as an item of damages. *Cummings v. Covey*, 229 S.W.3d 59, 61 (Ky.App. 2007). See also *Dulworth & Burress Tobacco Warehouse Co. v. Burress*, 369

S.W.2d 129 (Ky. 1963); *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973), *disapproved on other grounds by Jacobs v. Lexington-Fayette Urban County Government*, 560 S.W.2d 10 (Ky. 1977). In fact, KRS 453.260(5)(c) expressly exempts proceedings involving eminent domain from the statute authorizing attorney's fees in certain actions. See *Commonwealth of Kentucky, Department of Transportation v. Knierman*, 707 S.W.2d 340 (Ky. 1986). Further, Kentucky case law provides that, absent bad faith or unreasonable delay, a condemnor is not liable for any damages incurred by the landowner when the condemnation proceedings are abandoned before the owner's right to compensation is vested. *Commonwealth, Department of Highways v. Fultz*, 360 S.W.2d 216 (Ky. 1962); *Kroger Co. v. Louisville & Jefferson County Air Board*, 308 S.W.2d 435 (Ky. 1957); *J.F. Schneider & Son, Inc. v. Watt*, 252 S.W.2d 898 (Ky. 1952). In *Northern Kentucky Port Authority, Inc. v. Cornett*, 700 S.W.2d 392, 394 (Ky. 1985), the Kentucky Supreme Court opined,

We generally reject the idea of allowing fees and certain costs incurred in the defense of a condemnation action. When the action is completed, the condemnee recovers his expense through his award of just compensation. In the case of a successful defense, he has won and prevented the taking of his property. We do not want to place the litigants in the position of allowing a landowner to gamble on litigation rather than to accept legitimate offers of settlement. Such could increase the cost to the public of acquiring property and place an additional burden on the judicial process. However, when bad faith or unreasonable delay can be shown, and there is definite prejudice and damage to a condemnee, we see no reason to deny any recovery.

Citing to *Bernard v. Russell County Air Board*, 747 S.W.2d 610 (Ky.App. 1987), Appellants allege that throughout the condemnation proceedings, “TANK consistently ran roughshod over BIF's civil rights, ignoring state and federal law and did so with no intention of ever building a transit center. There can be no question that this litigation was prolonged by TANK not to build a transit center but for the purpose of undue harassment and expense to a private citizen.” As further evidence of TANK's alleged bad faith, Appellants rely upon the testimony of Jim Parsons, the former Boone County Administrator, who testified during the hearing that he was told by TANK's counsel that TANK was proceeding with the case because it did not want to pay Appellants' attorney's fees.

In its findings of fact, the trial court herein noted that TANK attempted to negotiate a voluntary purchase of the property at issue but that BIF's owner, William Fennell, was uncooperative and refused to negotiate. The trial court found that TANK thereafter duly filed its condemnation action. However, following the loss of federal funding in 2003, TANK failed to develop a new plan or budget with regard to the transit center and took essentially no further action on the project. As such, the trial court concluded that there was not “a reasonable assurance that the [property's] intended use would come to pass,” *Cornett*, 625 S.W.2d at 105, and that TANK's actions, or inaction, constituted gross abuse warranting a denial of the petition for condemnation. *Cooksey*, *supra*.

However, the trial court was careful to characterize TANK's conduct as a gross abuse rather than bad faith, because, in part, it found no evidence that TANK chose the property in question for any reason other than to develop a transit center which would eliminate stops in the area and make ridership easier. Further, like the trial court, we are not persuaded by the testimony of Jim Parsons. While Parsons claimed that counsel for TANK had conceded that it was pursuing the case to avoid paying Appellants' attorney's fees, Parsons did not provide any details as to when and where this alleged conversation took place. Moreover, as the trial court pointed out, "Mr. Parsons works for the law firm representing one of the Respondents and prepared a motion for directed verdict (citing testimony at trial) for the Respondents after a motion for separation of witnesses had been sustained." Certainly, the trial court was well within its discretion in assigning little credibility to Parsons' testimony.

We cannot conclude, based upon the evidence presented during the hearing, that the trial court abused its discretion in finding that TANK did not proceed in bad faith during the condemnation proceedings. Certainly, after the loss of federal funds, TANK's failure to take further action constituted gross abuse and justified the denial of its petition for condemnation. *See Commonwealth, Department of Highways v. Vandertoll*, 388 S.W.2d 358 (Ky. 1964); *Cooksey, supra*. Notwithstanding, the trial court's decision to deny attorney fees is supported by substantial evidence. *See Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002) ("Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.")

Finally, TANK has challenged the trial court's consideration of TANK's financial ability to construct the transit center in ruling that Tank did not have the right to take the property in question. However, TANK did not appeal from the trial court's findings of facts and conclusions of law and thus, this Court is without jurisdiction to consider the argument. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990); *Standard Farm Stores v. Dixon*, 339 S.W.2d 440 (Ky. 1960).

The Campbell Circuit Court's Findings of Fact and Conclusions of Law are affirmed.

ALL CONCUR.

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